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IN THE

Supreme Court of the United States

October Term, 1969
No. 962

SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, South Bay Daily Breeze, a division of Southern California Associated Newspapers, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding.

Opinions Below.

The opinion of the Ninth Circuit is reported at 415 F.2d 360 (9th Cir. 1969) and is reprinted in Appendix A, pp. 1a-18a[1]. The decision and order of the National Labor Relations Board are reported at 160 NLRB 1850 (1966) and are reprinted in Appendix B, pp. 19a-61a.

[1]The appendices are bound in a separate volume because of their length.

Jurisdiction.

The judgment of the Ninth Circuit was entered on August 1, 1969. Petitioner's timely petition for rehearing was denied on September 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the Fourth Amendment rule requiring the exclusion of illegally obtained evidence applies to evidence introduced by the Government in cease-and-desist proceedings before federal administrative agencies.

2. If so, whether the Fourth Amendment rule requiring the exclusion of illegally obtained evidence applies to evidence obtained through theft by the charging party in an unfair labor practice proceeding before the National Labor Relations Board and offered into evidence by the General Counsel for the Board.

3. Whether the National Labor Relations Act prohibits the enforcement of an order of the National Labor Relations Board in an unfair labor practice proceeding when the order is based upon evidence obtained through theft of the charging party and offered into evidence by the General Counsel for the Board.

Constitutional and Statutory Provisions Involved.

This case involves the Fourth Amendment to the Constitution of the United States, Appendix C, p. 62a, and the National Labor Relations Act,[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141, *et seq.*, Vol. 7 U.S.C. p. 6289, *et seq.* (1964), pertinent portions of which are set forth in Appendix D, pp. 63a-66a.

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[2]Hereinafter referred to as the "Act".

Statement of the Case.

Petitioner publishes newspapers in Torrance, California. After soliciting several authorization cards from petitioner's editorial department employees, the Los Angeles Newspaper Guild demanded that petitioner either recognize it as their bargaining representative or that an election among them be conducted by the National Labor Relations Board. Doubting that the Guild represented a majority of the employees, petitioner rejected the Guild's request for recognition. The Guild did not receive a majority of the votes cast in the election that followed. The Guild then charged that petitioner had committed unfair labor practices and objected to the election.

Gary Gillis, a Guild agent and a key solicitor of authorization cards,[3] stole a private memorandum from the city editor's desk.[4] Gillis made a copy and delivered it to the Guild's international representative, who in turn delivered it to the Board's General Counsel. Over petitioner's timely objection, the General Counsel introduced the memorandum into evidence at the unfair labor practice hearing after Gillis had testified how he had obtained it. R.T. 89-96.

The jurisdiction of the Board was asserted under Section 10(a) of the Act, as amended, 29 U.S.C. §160 (a), and was based upon a finding that petitioner's activities affected interstate commerce. App. B, p. 54a. Rejecting petitioner's argument that the stolen document was inadmissible, the Board relied on it to support

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[3]App. B, p. 23a.

[4]Gillis testified without contradiction that he took the document from the desk drawer without permission. R. T. 93-94.

its conclusion that petitioner had committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(5) of the Act and that its conduct had affected the result of the election. On October 12, 1966, the Board ordered that the election be set aside, that petitioner cease and desist from committing unfair labor practices, and that it bargain with the Guild upon request.[5]

The Board sought enforcement of its order in the Ninth Circuit pursuant to Section 10(e) of the Act, as amended, 29 U.S.C. §160(e). Rejecting petitioner's argument that the stolen document was inadmissible, the Ninth Circuit held, in conflict with other circuits, that the exclusionary rule is inapplicable in administrative cease-and-desist proceedings and that the Fourth Amendment does not require the exclusion of evidence obtained through private theft. The court concluded, however, that if admission of the document was improper, its prejudicial effect was sufficient to preclude enforcement of the Board's order. 415 F.2d 360, 363; App. A, p. 4a. The Ninth Circuit has stayed issuance of its judgment pending the filing of this petition.

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[5]The bargaining order was based on a finding that the Guild represented a majority of the employees in the bargaining unit. Of the 25 employees in the unit, 15 signed cards designating the Guild as their bargaining representative. Two of these cards were rejected in proceedings below. Moreover, employee Cole signed an authorization card after a Guild agent told him specifically that signing the card would not commit him to the Guild and that he could forget the language of the card authorizing the Guild to represent him. App. B, p. 48a. Thus, if Cole's card was improperly counted, the Guild represented less than half of the employees in the bargaining unit.

REASONS FOR GRANTING THE WRIT.

There are three reasons why certiorari should be granted in this case. First, as the court below observed, the circuits are in conflict as to whether the Fourth Amendment exclusionary rule is applicable in administrative cease-and-desist proceedings. The circuits are likewise in conflict as to whether the Fourth Amendment requires the exclusion of evidence obtained through private theft and introduced by the Government in those proceedings. Finally, this Court has not resolved whether the National Labor Relations Act requires that evidence stolen by the charging party be excluded from an unfair labor practice hearing.

I.

The Decision Below Admittedly Conflicts With Decisions of the Fifth Circuit and the Seventh Circuit as to Whether the Fourth Amendment Exclusionary Rule Is Applicable in Cease-and-Desist Proceedings Before Federal Administrative Agencies.

In rejecting petitioner's contention below that the document stolen by Gillis was inadmissible, the Ninth Circuit held that the Fourth Amendment exclusionary rule is inapplicable in unfair labor practice proceedings. 415 F.2d 360, 364; App. A, p. 6a. According to the Ninth Circuit, the Fourth Amendment "has only applied where 'criminal' or 'quasi-criminal' sanctions might be imposed." *Id.* Because criminal sanctions are not directly involved in this case,[6] the court held

[6] Although criminal sanctions were not directly available in this case, the Ninth Circuit's statement that they were not "involved"

(This footnote is continued on the next page)

that the exclusionary rule was inapplicable. Citing *Knoll Associates v. FTC,* 397 F.2d 530 (7th Cir. 1968),[7] and *NLRB v. Bell Oil & Gas Co.,* 98 F.2d 870 (5th Cir. 1938), as contrary authority, the Ninth Circuit acknowledged that its holding conflicted with decisions of other Courts of Appeals. This declared and important conflict demands resolution by this Court.

In *Knoll Associates v. FTC, supra,* the FTC charged that Knoll had violated Section 2(a) of the Robinson-Patman Act and urged that Knoll be ordered to cease and desist from further violations. In the hearing that followed, the Commission introduced documentary evidence which a disgruntled employee of Knoll's sales representative had stolen from his employer. The FTC concluded from this evidence that Knoll had violated Section 2(a) and ordered it to cease and desist from further violations.

On review the Seventh Circuit set the order aside, holding in part that the Fourth Amendment exclusionary rule applies with full force in Commission proceedings. The court stated laconically that "We must not be misled by the legal classification of the nature of the proceeding." 397 F.2d 530, 534; App. E, p. 75a.

As the Ninth Circuit conceded, the FTC proceeding in *Knoll* is for constitutional purposes indistinguishable from the Board proceeding in this case. Both Knoll and petitioner were charged by a federal agency

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is misleading. Violation of a Board order is not punishable by law. 29 U.S.C. §160. If, however, a Court of Appeals enforces a Board order, as the Act provides, 29 U.S.C. §160(e), violation of the court's decree may constitute contempt punishable by fine or imprisonment or both. 18 U.S.C. §401.

[7]The decision of the Seventh Circuit in *Knoll* is reprinted in Appendix E, pp. 67a-82a.

with a violation of a federal statute, the only immediate sanction for which is an order to cease and desist.[8] Neither action was "criminal" in nature, for violations of Section 2(a) of the Robinson-Patman Act and Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act are not punishable by traditional criminal sanctions. Yet the consequences of each are nonetheless serious: As Knoll undoubtedly faced private litigation and a loss of customers, so petitioner faces the consequences of an order to bargain with a labor organization.

The court below and the Fifth Circuit are in similar conflict. As an obvious example of incompetent evidence in Board proceedings, the Fifth Circuit cited evidence unconstitutionally obtained. *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 870 (5th Cir. 1938). The court then declared:

> "If the Board should base its findings solely upon evidence obtained by an unconstitutional search, the order resting thereon would be invalid, because such evidence is incompetent." 98 F.2d 870, 871 (dictum).

Although it is clear that the search warrant requirements of the Fourth Amendment apply to investigations conducted by administrative agencies, see *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 207-208 (1946); *Jones v. SEC*, 298 U.S. 1, 26-27 (1936); *FTC v. American Tobacco Company*, 264 U.S. 298, 305-306

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[8]Petitioner in the instant case has also been ordered to bargain with the Guild upon request and to post notices announcing that it will cease committing unfair labor practices. App. B, pp. 58a-59a.

(1924), this Court has not resolved whether the Fourth Amendment and the exclusionary rule apply to administrative cease-and-desist proceedings. Certainly it has not limited the protection of the Fourth Amendment to persons suspected of having committed a crime. *See, e.g., Camara v. Municipal Court,* 387 U.S. 523 (1967). (Inspection for housing code violations without a search warrant held unconstitutional.)[9]

This conflict between circuits is important and is one which warrants this Court's attention. The cease-and-desist order is the procedural backbone of many federal agencies. In fiscal 1968, for example, the NLRB issued in contested decisions alone over 900 orders similar to its order in this case.[10] Likewise in fiscal 1969, the FTC decided 221 cases in which an order to cease and desist was the ultimate sanction.[11] Petitioner submits that respondents in these proceedings are entitled to the protection of the exclusionary rule. Two Courts of Appeals disagree with the court below as to whether the right may be asserted under these circumstances. By granting the writ prayed for in this petition, this Court can resolve that question.

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[9]In *Camara* this Court remarked: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. 523, 530.

[10]33 NLRB Ann. Rep. 15 (1968).

[11]Report of the ABA Commission to Study the Federal Trade Commission, at 20 (1969).

II.

The Decision Below Conflicts Directly With a Decision of the Seventh Circuit as to Whether the Fourth Amendment Requires the Exclusion of Evidence Obtained Through Private Theft and Introduced by the Government in Administrative Proceedings.

As an alternative to its holding that the exclusionary rule is inapplicable in unfair labor practice proceedings, the court below decided that if it applied, the stolen document was nevertheless admissible because the Board did not participate in the theft. This holding also conflicts with the Seventh Circuit's decision in *Knoll Associates v. FTC*, 397 F.2d 530 (7th Cir. 1968) *reversing* __ F.T.C. __, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶17,668, p. 22,952 (1966).[12]

The circumstances in *Knoll* are strikingly similar to the facts of this case. A year after the FTC had charged that Knoll had violated the Robinson-Patman Act, Prosser, the disgruntled employee, informed the Commission's lawyers that he possessed incriminating evidence against Knoll. The lawyers rejected Prosser's offer. [1965-1967 Transfer Binder] Trade Reg. Rep. 22,952; 22,965. Thereafter Prosser stole the documents and renewed his offer to the Commission, assuring the lawyers that the documents were not Knoll's property and that he had taken them from his personal files. Upon that understanding the lawyers accepted them.

The Seventh Circuit held that the FTC's use of the stolen documents violated Knoll's Fourth Amendment

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[12]Pages 22,959 through 22,962 of the Commission's opinion are reprinted in Appendix F, pp. 83a-91a, to clarify the Seventh Circuit's cryptic statement of the facts.

rights, even though Government agents neither participated in nor encouraged the theft. The court declared:

> "The action of the Commission in utilizing the fruits of the misconduct of Prosser violated rights of petitioner protected by the fourth amendment to the federal constitution. The undisputed evidence shows that Prosser stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission *by its use of the documents*[13] knowingly gave its approval to Prosser's unlawful act. . . ." 397 F.2d 530, 533; App. E, p. 74a.

The decision below conflicts directly with this holding. Like the FTC in *Knoll,* the Board neither participated in nor encouraged Gillis' theft of the memorandum, but used it after learning that it had been stolen. The Seventh Circuit concluded that in such a case the Fourth Amendment requires that the evidence be excluded. The Ninth Circuit now erroneously has held it admissible.

Recognizing this conflict, the Ninth Circuit purported to distinguish *Knoll* on two grounds: (a) that Prosser acted as a government agent; and (b) that, unlike the thief in this case, Prosser stole the documents for the purpose of assisting the Commission. Both distinctions are untenable.

The Seventh Circuit did not hold in *Knoll* that "the actions of the government and the thief were so related as to make the thief a government agent. . . ." as the

[13]Emphasis here as elsewhere is added unless otherwise noted.

Ninth Circuit asserts. 415 F.2d 360, 363; App. A, p. 6a. At no point in its opinion does the Seventh Circuit contradict the findings of the Commission that the FTC neither participated in nor encouraged Prosser's independent theft of the documents. [1965-1967 Transfer Binder] Trade Reg. Rep. 22,952, 22,966. Instead, the *Knoll* court held the evidence inadmissible because the Commission had approved Prosser's unlawful act by using the documents he had stolen. 397 F.2d 530, 536; App. E, p. 80a.

That Prosser's motive was to assist the FTC likewise provides no relevant distinction between *Knoll* and this case. Admittedly, the Seventh Circuit made note of Prosser's motives in its opinion. But the findings in *Knoll* establish that the FTC in no way encouraged Prosser's actions. The Seventh Circuit held the stolen evidence inadmissible because the FTC effectively ratified Prosser's theft by using it. Prosser's motives, therefore, are simply not relevant to the holding of the court.

In concluding that the stolen evidence was admissible, the court below believed it was constrained to follow *Burdeau v. McDowell,* 256 U.S. 465 (1921). This Court's decision in *Elkins v. United States,* 364 U.S. 206 (1960), petitioner submits, overruled *Burdeau* by implication. Decisions of this Court since 1921 have bypassed the *Burdeau* rule; it now awaits only formal overruling.[14]

[14]Moreover, this case is factually distinguishable from *Burdeau* because of the unique status of a charging party in an unfair labor practice proceeding. The thieves in *Burdeau* had no connection with the Government. In this case, however, the thief was clearly an agent of the Guild, the charging party in the proceeding in which the evidence was introduced. The relationship between a charging party and the General Counsel is

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In *Burdeau,* private detectives delivered papers they had stolen from McDowell's office to the Department of Justice. As the Attorney General prepared to present them to a grand jury, McDowell petitioned for their return, claiming that the Government's use of stolen evidence would violate his Fourth and Fifth Amendment rights. Over the dissent of Justices Brandeis and Holmes, this Court held that McDowell's petition should have been denied because the Government had had nothing to do with the theft of the papers. The Fourth Amendment, this Court declared, does not require the exclusion of evidence not obtained by Government agents.

In *Elkins v. United States,* 364 U.S. 206 (1960), this Court held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's Fourth Amendment rights, is inadmissible in a federal trial even though federal officers did not participate in the search and seizure. At the time of that decision, state courts were not obliged to exclude evidence unconstitutionally obtained.[15] The exclusionary rule announced in *Weeks v. United States,* 232 U.S. 383 (1914), applied only to federal courts. Yet even though the rule was not directed

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intimate and unique: Though the charging party initiates the action by filing a charge, the General Counsel for the Board prosecutes it, usually with the charging party's assistance. Thus the General Counsel was provided with evidence in this case obtained by the party whom he effectively represented. (In fact, the Guild did not even appear by other counsel at the hearing.) Although the General Counsel neither participated in nor encouraged the theft of the document, his relationship to the charging party distinguishes this case from the circumstances presented in *Burdeau v. McDowell.*

[15] *Mapp v. Ohio,* 367 U.S. 643 (1961), held that the Fourteenth Amendment requires state courts to exclude evidence unconstitutionally obtained.

at state officers, *Elkins* held that it applied to evidence obtained by them, for in that way there could be no inducement to federal agents to evade the Fourth Amendment through other officials not so restricted. This Court declared:

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered." 364 U.S. 206, 221-222.

This rationale is equally applicable to evidence obtained by private individuals. As the "silver platter doctrine"[16] provided an inducement to federal officers tactily to encourage state officers to obtain evidence by methods the federal officers could not employ, so the *Burdeau* rule provides the same inducement for the tacit encouragement of private individuals.[17] In this case, as in *Elkins*, there is no indication that Govern-

[16] *Lustig v. United States*, 338 U.S. 74, 79 (1949).

[17] *Cf. Corngold v. United States*, 367 F.2d 1, (9th Cir. 1966) (lacking search warrant, customs officials encouraged airline agent to open defendant's packages under authority of contract of carriage; evidence thus obtained held inadmissible).

ment agents had any knowledge of the theft until after it had been accomplished.[18] And as in *Elkins*, the Government in this case has used the evidence thus obtained. Because the *Elkins* rationale is equally applicable in these circumstances, petitioner submits that *Elkins* overruled *Burdeau* by implication. This Court should now consider the question directly.

As this Court observed in *Burdeau*, the purpose of the Fourth Amendment is to protect the privacy of the individual against invasions by the Government, not against trespasses by private citizens. Petitioner does not contend otherwise. But it does not follow from that statement of purpose that the Government should therefore be permitted in federal proceedings to use evidence obtained illegally through non-governmental sources. Such a rule subverts the purpose of the Fourth Amendment, for it provides inducement to the Government to encourage illegal private action and to barter with thieves for the fruit of their crimes. Faced in *Elkins* with a similar relationship between federal agents and unrestrained state agents, this Court rejected the "silver platter" doctrine. Petitioner submits that it should now consider whether to do likewise with respect to thefts by private individuals.

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[18]Petitioner concedes for the sake of argument that the General Counsel did not learn that Gillis had stolen the document until he testified at the hearing. After Gillis testified that he had stolen the document, the General Counsel introduced it into evidence. R. T. 95.

III.

The Court Below Has Decided an Important Question of Federal Statutory Law Which Has Not Been, but Which Should Be, Settled by This Court.

The Ninth Circuit rejected petitioner's argument that the admission in Board proceedings of evidence illegally obtained by a member of a labor union subverts national labor policy, as declared by Congress in the Act, and that an order based upon such evidence should for that reason not be enforced. Petitioner submits that this question is critically important to the fair conduct of Board proceedings; that the Ninth Circuit decided it incorrectly; and that it should now be settled by this Court.

The preamble to the Act declares that industrial peace is the object of this legislation.[19] Indispensable to a peaceful system for settling labor disputes is a rule that only fair means be used in preparation for the proceedings. A party to a labor proceeding should legitimately expect that his opposition will employ only lawful devices in preparing its case. The Board and the courts must protect this expectation; the peaceful system Congress sought will otherwise break down.

Petitioner submits that to implement this right and to discourage its violation, this Court should hold that

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[19]Section 1(b) of the Act states: "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 141(b) (1964).

evidence obtained illegally by either party to a labor dispute is inadmissible in unfair labor practice proceedings and that an order grounded in such evidence is unenforceable in the Courts of Appeals. To admit such evidence is to escalate unnecessarily the existing conflict between labor and management.

Speaking of evidence obtained through illegal wiretapping. Justice Holmes said, dissenting in *Olmstead v. United States,* 277 U.S. 438 (1928):

> ". . . [A]part from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore, we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U.S. 438, 469-70.

The statement is apposite to this case. Whatever the requirements of the Fourth Amendment, the Board ought not to use evidence obtained by a criminal act. The practice and procedure of federal administrative agencies should be a model for the rest of the country.

Excluding evidence from federal proceedings that individuals have obtained illegally serves that purpose, for it demonstrates federal unwillingness to permit or to encourage unlawful activity to accomplish lawful ends. Hence petitioner submits that this Court should now consider whether the Act requires that such evidence be excluded from unfair labor practice proceedings.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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December 17, 1969.

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